(2)

Supreme Court, U.S.
FILED
DEC 11 1998
CLERK

No. 98-793

In the
SUPREME COURT OF THE UNITED STATES
October Term 1998

CHERYLE ANN SCHEERER, et. ux.,
Petitioners,

vs.

HARDEE'S FOOD SYSTEMS, INC.,
Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION OF PETITION FOR A WRIT OF CERTIORARI

Paul Hasty, Jr.
Wallace, Saunders, Austin,
Brown & Enochs, Chtd.
10111 W. 87th Street
P.O. Box 12290
Overland Park, KS 66282-2290
(913) 888-1000
FAX (913) 894-9403

ATTORNEYS FOR RESPONDENT

12 pp

QUESTION PRESENTED

May the contemporaneous statement of a witness, rationally based on the witness' own first-hand perceptions, be admitted into evidence under Fed.R.Evid. 602 and Fed.R.Evid. 701 if it reasonably aids the jury's understanding of a fact in issue and if the reasonable inference from the statement is relevant to rebut plaintiff's evidence that there was water and oil running through the parking lot that caused plaintiff to fall, but the reasonable inference of the contemporaneous statement of the lay witness was that there was no water or oil running through the parking lot in the area where plaintiff fell?

TABLE OF CONTENTS

Question Presented i

Statement of the Case 1

Argument 3

Conclusion 9

STATEMENT OF THE CASE

Cheryle Scheerer fell in the parking lot of a Hardee's Restaurant on June 28, 1989 and fractured her knee cap. She claimed that the fall occurred after she walked out of the restaurant on a very hot and humid day. She was walking downhill. She claimed that she walked beside a parked car, and when she got to the back of that car, she turned. At that point, she slipped and fell. Plaintiffs claimed that the lot had previously been washed by a Hardee's employee using a chemical solution to remove oil and grease from the parking spaces. Plaintiffs also claimed that at the time plaintiff fell, a Hardee's employee was watering flowers. Plaintiffs claimed that streams of water and oil were running through the parking lot and that water and oil caused plaintiff to fall. One of the fact questions the jury was called upon to determine was whether there was water and oil on the lot that caused Mrs. Scheerer to fall.

Mrs. Fann heard the plaintiff fall and immediately came to her aid. She knelt down on the ground with Mrs. Scheerer and stayed with her for 20 minutes or so until an ambulance arrived. Mrs. Fann admitted that she said, at the scene of the accident, that the fall must have been caused by plaintiff's slick

shoes. She also testified, at trial, that if there had been water and oil on the parking lot in the area where plaintiff fell, she would have made a different statement.

ARGUMENT

The United States District Court for the Western District of Missouri and the Eighth Circuit Court of Appeals both recognized the fallacy of plaintiff's position with regard to the admissibility of the statement made by Mrs. Fann. Plaintiffs, in both courts, took the same simplistic approach to the issue that plaintiffs have taken before this Court. Plaintiffs simply refused to recognize that evidence that is inadmissible for one purpose may be admissible for another.

Plaintiffs claim that Hardee's employees were negligent. Plaintiffs claim that a Hardee's employee was using a chemical to remove oil and grease from the parking stalls on the parking lot and that he simply washed all that chemical, oil, and grease, into the center of the parking lot and left it there. Plaintiffs also claimed that a Hardee's employee was using a hose to water flowers and that water from the watering project was running, in streams, through the parking lot. It was plaintiffs' claim that plaintiff fell in all that water and oil.

The defendant, on the other hand, claimed that the parking lot was absolutely dry where plaintiff fell. The defendant's evidence was that there was no water on the parking

lot. The defendant's evidence was that there was no water running through the parking lot. The defendant's evidence was that there was no water or oil or grease on the parking lot in the area where plaintiff fell.

Mrs. Fann was an acquaintance of the Scheerers. She was in the process of getting into the car that plaintiff walked beside and turned behind just prior to plaintiff's fall. She heard plaintiff's fall, and immediately went to plaintiff's aid. She knelt down on the ground with plaintiff and stayed with Mrs. Scheerer until the ambulance crew arrived. She stayed there untilMrs. Scheerer was moved from the scene by the ambulance personnel. She is the one who admitted, at trial, that she said that plaintiff must have fallen because of her slick shoes.

Plaintiffs have asked this Court to limit the Court's view of the case in the same way that plaintiffs asked the trial court and the Eighth Circuit Court of Appeals to take a restricted view of the evidence. It's plaintiffs' position that because Mrs. Fann did not examine the soles of Mrs. Scheerer's shoes, she didn't have the proper foundation to make a conclusory allegation of whether the soles of Mrs. Scheerer's shoes were slick or not slick. However, the evidence was admissible on the

issue of whether there were streams of water, oil, and grease running through the parking lot where plaintiff fell. No reasonable person would conclude that Mrs. Scheerer had fallen because her shoes were slick if there were rivers of water, oil, and grease running through the parking lot where Mrs. Scheerer fell. Even Mrs. Fann admitted, when she testified at trial, that she would not have stated, "it must have been her slick shoes" if there had been water and oil/grease in the area. Her statement was a contemporaneous statement that she made at the time she perceived the events, and the reasonable inference of her statement is that the condition of the parking lot was just as claimed by the defendant i.e. without water and oil running through it.

Plaintiffs' statement that there was no other evidence presented by the defendant on the condition of the parking lot is simply false. Plaintiffs both testified. Neither of them could see any reason, at all, for plaintiff to have fallen. In fact, while Mrs. Scheerer was in surgery, Mr. Scheerer went back to the parking lot to investigate further to see if he could find any reason for plaintiff to have fallen. He couldn't find any reason for her to have fallen either when he looked around the parking lot at the

time of Mrs. Scheerer's fall or when he went back to the parking lot. He took a number of photographs of all areas of the parking lot. All of that evidence wassubmitted to the jury. It all tends to show that there were no streams of water and oil/grease running through the parking lot. If there had been, there wouldn't have been any reason for Mr. Scheerer to go back to the parking lot to try to figure out what might have happened.

In addition, Mrs. Scheerer testified that at the spot she slipped, the lot was dry. She also testified that she saw no one watering flowers, and even though plaintiffs' claim was that the hose used to water the flowers was attached to a spigot on one side of the door and the watering was occurring on the other side of the door, requiring the Hardee's employee to string the hose across the door, she saw no hose. Mrs. Fann saw no hose. Mr. Scheerer saw no hose. Mrs. Fann knelt down on the ground with the plaintiff and stayed with her. She didn't get wet. She didn't oily or greasy.

Finally, the shoes, themselves, were exhibits. The jury could look at them. They have a very hard and a slick sole.

Plaintiffs' argument to this Court concerning the Incident Report is nothing short of frivolous. After the first jury trial,

the Eighth Circuit reversed and held that the Incident Report was not a business record and it was error to admit the Incident Report as a business record because it contained hearsay. At the second jury trial, the Incident Report was not mentioned. It was not offered as evidence. As far as the jury knew, there never had been an Incident Report. There is absolutely nothing for this Court to review with regard to the Incident Report. There is simply no issue with regard to it.

Plaintiffs' representation to this Court that in the first jury trial (Scheerer II), Mrs. Fann didn't admit that she was the source of the "slick shoes" comment as simply a misrepresentationto the court. As the Eighth Circuit recognized, Mrs. Fann did admit making that statement at the first jury trial. She testified:

> "Q: (by Mr. Hasty) Were you the one, Ms. Fann, that decided or stated after she fell that it must have been her slick shoes?
>
> A: That was the conclusion I made, the comment, the fact that she had on black patten leather shoes."

Plaintiffs can tell this Court that Mrs. Fann did not admit making the statement, when she testified at the first jury trial, but just because plaintiffs have told the Court that is true doesn't

make it so. It is a misrepresentation to the Court by plaintiffs.

Furthermore, Mrs. Fann's testimony at the second jury trial, and that is the one from which plaintiffs are now asking this Court to issue a Writ of Certiorari, was that she did, in fact, make that statement. It is therefore totally irrelevant whether her statement was recorded in the Incident Report. The Incident Report was not admitted into evidence and wasn't even offered in evidence. Plaintiffs' complaint seems to be that Mrs. Fann made the statement at the time of plaintiff's fall and plaintiffs don't like it. The statement made by Mrs. Fann was relevant and it was appropriately admitted into evidence because the reasonable inference of the statement rebuts plaintiffs' claim that there were streams of water, oil and grease running through the parking lot in the area where plaintiff fell. The statement was not admitted to show that Mrs. Fann had examined the soles of Mrs. Scheerer's shoes and found them to be slick. The evidence showed that there was no other reasonable reason seen by the witness for plaintiff to have fallen, and the witness was right there in the parking lot, right there with plaintiff, and saw the conditions at the time. The Eighth Circuit correctly ruled the issue.

CONCLUSION

There is no issue in this case that merits yet another trial, and there is certainly no issue in this case that merits review by this Court.

WALLACE, SAUNDERS, AUSTIN,
BROWN AND ENOCHS, CHARTERED

By _____

Paul Hasty, Jr. KS #09132 MO #34470
10111 West 87th Street
P.O. Box 12290
Overland Park, Kansas 66282
(913) 888-1000
FAX (913) 894-9403

ATTORNEYS FOR RESPONDENT